

No. 14110

United States
Court of Appeals
for the Ninth Circuit

A. L. KAYE,

Appellant,

vs.

BANK OF FAIRBANKS, a Banking Corporation,
Appellee.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Fourth Division

FILED

JAN 19 1954

PAUL P. O'BRIEN
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Attorney for Plaintiff and Appellant.

MAURICE T. JOHNSON,

Box 1511, Fairbanks, Alaska,

Attorney for Defendant and Appellee.

In the District Court for the District of Alaska,
Fourth Division

No. 7309

A. L. KAYE,

Plaintiff,

vs.

BANK OF FAIRBANKS, a Banking Corporation,
Defendant.

COMPLAINT

Comes Now the plaintiff above named and for cause of action against the above-named defendant, complains and alleges:

I.

That at all the times and places herein mentioned, the above-named defendant was and is now a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, and engaged in the general banking business in Fairbanks, Alaska.

II.

That on the 23rd day of October, 1952, the above-named plaintiff had on deposit with the said defendant the sum of Fourteen Hundred Eighty Dollars (\$1480.00), in a special checking account, and the said money was the property of the plaintiff.

III.

That on the 23rd day of October, 1952, the said Defendant wrongfully and wilfully converted and

disposed of said sum of \$1480.00 to its own use, and unlawfully refused to allow the said Plaintiff to withdraw said money from said Bank to the damage of Plaintiff in the sum of Fourteen Hundred Eighty Dollars (\$1480.00).

Wherefore, Plaintiff demands judgment against Defendant in the sum of Fourteen Hundred Eighty Dollars (\$1480.00), together with interest thereon at the rate of 6% per annum from [1*] the 23rd day of October, 1952, together with the costs and disbursements herein and a reasonable sum to be allowed Plaintiff by the Court as an Attorney's fee.

/s/ JULIEN A. HUSLEY,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed November 7, 1952. [2]

[Title of District Court and Cause]

ANSWER

Now Comes the above-named Defendant, Bank of Fairbanks, a Banking Corporation, and for answer to the Complaint of the Plaintiff, admits, denies and alleges as follows:

I.

The Defendant admits the allegations contained in Paragraphs I and II of the Complaint.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

II.

The Defendant denies the allegations contained in Paragraph III of said Complaint; and

For a First Affirmative Defense, the Defendant alleges as follows:

I.

The Defendant moves to dismiss the above-entitled cause on the ground and for the reason that the Complaint does not state facts sufficient upon which to base a claim against the Defendant; and

For a Second Affirmative Defense, the Defendant alleges as follows:

I.

The Defendant alleges that the funds deposited in the bank of the Defendant by the Plaintiff were the property of the Plaintiff, and that said funds were deposited without instructions, [3] and were not a special fund, and that at the time of said deposit the Plaintiff was indebted to the Bank of Fairbanks in a sum far in excess of said deposit, and that the said indebtedness was due and owing at that time by the Plaintiff to the Defendant bank, and that therefore the Defendant applied the said funds on deposit in the name of the Plaintiff as part payment of the indebtedness then due and owing by the Plaintiff to the Defendant bank.

Wherefore, the Defendant prays that the Plaintiff take nothing by his Complaint and that the Defendant be hence dismissed with its costs and reasonable attorney's fee.

BANK OF FAIRBANKS,
Defendant,

By /s/ R. C. BAILEY,
Vice-President.

Duly verified.

Service of Copy acknowledged.

[Endorsed]: Filed May 5, 1953. [4]

In the District Court for the District of Alaska,
Fourth Judicial Division

No. 7309

A. L. KAYE,

Plaintiff,

vs.

BANK OF FAIRBANKS, a Banking Corporation,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: Hon. Harry E. Pratt, District Judge.

Appearances :

GEORGE B. McNABB,

Of Fairbanks, Alaska,

Attorney for Plaintiff.

MAURICE T. JOHNSON,

Of Fairbanks, Alaska,

Attorney for Defendant.

Date: October 8, 1953.

Place: Fairbanks, Alaska.

Be It Remembered, that upon the 8th day of October, 1953, the trial was had in cause No. 7309, plaintiff and defendant represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: This is the time set for trial in the case of Kaye vs. Bank of Fairbanks.

Are counsel ready to proceed?

Mr. McNabb: The plaintiff is ready, your Honor.

Mr. Johnson: The defendant is ready.

The Court: Very well, we will start.

Mr. McNabb: As the plaintiff's first witness, your Honor, I would like to call Mr. Bailey.

RALPH BAILEY

a witness called in behalf of the plaintiff, was sworn and testified as follows:

Direct Examination

By Mr. McNabb:

Q. Will you state your name, please?

A. Ralph C. Bailey.

Q. Where do you reside, Mr. Bailey?

A. 1325-6th.

Q. In what city? A. Fairbanks, Alaska.

Q. By whom are you employed, sir?

A. Bank of Fairbanks. [3*]

Q. What is your capacity with that bank?

A. Vice president.

Q. How long have you been employed by the Bank of Fairbanks? A. Seven years.

Q. Has that employment been continuous?

A. It has.

Q. How long have you been the vice-president of the bank? A. Three and one-half years.

Q. You were made vice-president in the year 1950, is that correct, or 1949?

A. Either 1949 or 1950, I don't recall exactly.

Q. Are you acquainted with Mr. A. L. Kaye, the plaintiff in this action? A. I am.

Q. How long have you known Mr. Kaye?

A. Seven years.

Q. Does Mr. Kaye have an account in your bank? A. He does.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Ralph Bailey.)

Q. Do you know how long he has maintained an account in your bank? A. Not definitely.

Q. Did he have an account in your bank in the year of 1952? [4] A. He did.

Mr. McNabb: Will you mark this for identification, please?

Clerk of Court: Plaintiff's Identification No. 1.

(The notification to plaintiff of debits to his bank account, dated October 23, 1952, was marked Plaintiff's Identification No. 1.)

Q. (By Mr. McNabb): Mr. Bailey, I show you Plaintiff's Identification No. 1 and ask you if that is a copy of your signature affixed thereto?

A. It is.

Q. What is that slip, sir, Plaintiff's Identification No. 1, if you know?

A. It is a debit against the man's account.

Q. Against whose account?

A. A. L. Kaye, special account.

Q. And in what bank?

A. Bank of Fairbanks.

Q. When was that debit made, Mr. Bailey?

A. This is dated October 23, 1952, but our records indicate that it cleared the bank October 24, 1952. [5]

Q. The day following? A. That is right.

Q. When you say this is a debit, was that a charge against Mr. Kaye's account?

A. That was a charge against Mr. Kaye's account.

(Testimony of Ralph Bailey.)

Q. And the bank withdrew some money, that is, \$1,480, as shown here, from Mr. Kaye's account?

A. That is correct.

Q. For what purpose was that withdrawn, Mr. Bailey?

A. For funds due and owing us, and also past due.

Q. Will you read, please, the items which constitute that charge?

Mr. Johnson: If the Court please, it seems to me that the document would speak for itself, if he wants to offer it in evidence.

The Court: Yes, I will take a look at it myself.

Mr. McNabb: I move that Plaintiff's Identification No. 1 be admitted in evidence, your Honor.

Clerk of Court: Plaintiff's Exhibit A.

(Notification to plaintiff of debits to his bank account was received in evidence as Plaintiff's Exhibit A.)

PLAINTIFF'S EXHIBIT A

We Have This Day Charged Your Account as
Follows:

Fairbanks, Alaska, October 23, 1952.

	Amount
Paid Clerk of Court.....	21.00
Paid United States Marshal.....	9.00
Paid Retainer Maurice Johnson atty at law.	250.00

(Testimony of Ralph Bailey.)

Paid Balance of Retainer Maurice Johnson

atty at law.....1,200.00

Total1,480.00

To A. L. Kaye—Special Account

Box 550

City

By /s/ R. C. BAILEY,

Vice President.

Bank of Fairbanks 59-20

Received in evidence October 8, 1953.

Q. (By Mr. McNabb): Mr. Bailey, Plaintiff's Exhibit A shows that a notation was made of "Paid Clerk of Court \$21.00." Do you know [5-A] what that charge was for? A. Yes.

Q. What was it for?

A. It was given to our attorney to file a case against A. L. Kaye.

Q. Given to whose attorney?

A. Our attorney.

Q. Who was that?

A. Maurice T. Johnson.

Q. The second item on Plaintiff's Exhibit A, "Paid United States Marshal, \$9.00."

A. Given to our attorney for payment to the United States Marshal to serve papers.

Q. When you say "our," who do you mean?

(Testimony of Ralph Bailey.)

A. The Bank of Fairbanks, our attorney.

Q. The Bank of Fairbanks' attorney?

A. That is right.

Q. The third item, "Paid Retainer Maurice Johnson atty at law \$250.00"?

A. That is correct.

Q. What was that charge for?

A. We retained attorney Johnson as our attorney, and that was a retainer in this particular case.

Q. In what case?

A. Bank of Fairbanks vs. A. L. Kaye. [6]

Q. The fourth item——

The Court: What was this case? What was the number of it?

Mr. McNabb: 7114.

Mr. Johnson: That case is pending before this Court, your Honor.

Mr. McNabb: May I see that file, please, Judge?

Q. (By Mr. McNabb): Mr. Bailey, I will show you the file in Cause No. 7114, which is the case of the Bank of Fairbanks, an Alaska corporation, plaintiff, against A. L. Kaye, Jean Kaye and Josephine Boussard. Do you know whether this is the case for which the charge was made, as is evidenced by Plaintiff's Exhibit A?

A. No, I do not know definitely. I leave that up to my attorney, but it appears to be on the surface.

Q. Mr. Bailey, is there any other case pending, to your knowledge, in which the Bank of Fairbanks has sued A. L. Kaye? A. No.

(Testimony of Ralph Bailey.)

Q. Was there such a case on October 23 or 24 of 1952?

A. Yes.

Q. There was another case?

A. No other cases. This is the only case.

Q. That is it, then?

A. That is correct. [7]

Q. The fourth item on Plaintiff's Exhibit A is "Paid Balance of Retainer Maurice Johnson atty at law \$1,200.00." What was that?

A. That was attorney's fees.

Q. For what?

A. For his services rendered to that date. You understand the suit started back in April, 1952.

Q. Now, then, you say the suit. What suit do you mean, Mr. Bailey?

A. Bank of Fairbanks, plaintiff, against a foreclosure on the piece of property—A. L. Kaye, defendant.

Q. Did Mr. Kaye employ Mr. Johnson to represent him on that case?

A. Not to my knowledge.

Q. He was the bank's attorney in that case?

A. That is correct.

Q. Why did you charge Mr. Kaye's account for your attorney?

A. Because it was due and owing.

Q. What was due and owing?

A. The \$1,480.

Q. Mr. Bailey, had that case reached a judgment at that time, on the 23rd of October or the 24th of October?

(Testimony of Ralph Bailey.)

A. No, it hadn't, not to my knowledge.

Q. Has it yet? [8]

A. Not to my knowledge.

Q. Did Mr. Kaye agree to pay Mr. Johnson?

A. Not to my knowledge. However, our records indicate that we are allowed to do——

Q. I say, though, did Mr. Kaye agree with you to pay Mr. Johnson's fee? A. No.

Q. Do you have any evidence in writing that he did? A. No.

Q. I beg your pardon? A. No.

Q. He didn't employ Mr. Johnson to represent him that you know of?

A. Not to my knowledge.

Q. There is, to your knowledge, no other action which was pending between Mr. Kaye and the bank?

A. No.

Q. And this is the charge that was made for the file which I showed you? A. That is correct.

Q. And the bank had employed Mr. Johnson?

A. We had.

Q. And Mr. Kaye hadn't?

A. Not to my knowledge.

Q. What did Mr. Kaye get for his \$1,480? [9]

A. Moneys due and owing the Bank of Fairbanks.

Q. He got moneys due?

A. I mean it was due the Bank of Fairbanks.

Q. Why was it due the Bank of Fairbanks?

A. Because he was indebted to us at that particular time for some \$12,000.

(Testimony of Ralph Bailey.)

Q. For what?

A. Some \$12,100. He was indebted to the Bank of Fairbanks at that particular time.

Q. But this \$1,480, was he indebted to you for that amount?

A. That is correct. Our instruments indicate that if any legal fees have been charged up against an account that is past due or owing, I believe you will find that we are allowed to take moneys and funds from the accounts that are properly due and owing.

Q. What is the nature of this case 7114, do you know? A. Yes.

Q. What is it?

A. It is a foreclosure on a piece of property.

Q. What do you mean, "a foreclosure on a piece of property"?

Mr. Johnson: It seems to me, your Honor, that that is as good an answer as could be expected from the witness. He is not a lawyer. [10]

The Court: It is a mortgage foreclosure, isn't it?

The Witness: That is correct.

Q. (By Mr. McNabb): Was the indebtedness of Mr. Kaye to the bank evidenced by a promissory note?

A. Secured by property documents, with security a piece of property.

Q. Are there notes which are secured by a mortgage? A. That is correct.

(Testimony of Ralph Bailey.)

Q. And this action 7114 was a mortgage foreclosure? A. That is correct.

Q. And the notes were at that time in default on more than one of them?

A. That is correct.

Q. Now, then, did you charge Mr. Kaye's account with any of the money that was due on those debts—on the notes? A. Would you repeat?

Q. Did you charge Mr. Kaye's account and take money from his account to apply on the notes?

A. I have previously to this.

Q. But did you on this debt?

A. Not on that debt, no. That went for another purpose.

Q. Is there still money due you?

A. There is.

Q. And Mr. Kaye has money in your bank? [11]

A. He does.

Q. Have you charged him subsequently with any—— A. I have not.

Q. What you did, then, was charge him for the money which you had paid to Mr. Johnson? That is what this Plaintiff's Exhibit A shows, this was attorney's fees? A. That is right.

Q. And it had nothing to do with the debt?

A. It could have because we would have the right to put it on the reverse side and add it to our notes. Rather than that, I took it from our account. I could have done it one of two ways.

Q. Did Mr. Kaye authorize you to employ Mr. Johnson? A. No.

(Testimony of Ralph Bailey.)

Q. Let me ask you again, Mr. Bailey, what did Mr. Kaye get for his \$1,480?

A. \$12,100, part of it which was in default.

Q. What part.

A. Well, it is a debt due and owing. I could have increased the notes on the reverse side of the note and added it to there and not take out of the account what I could take out of the account, and I had charged his account previously the same way.

Q. But the loans had been made previous to the 23rd or 24th or 25th of October, when his account was charged? [12]

A. That is correct. Those funds we put up in the bank in April, 1952.

Q. So he didn't get twelve thousand, did he?

A. He didn't get it. He owed it. It was long past due.

Q. I ask you again; what did he get for his \$1,480?

A. He, individually, lost. He didn't get anything.

Q. He didn't get anything, did he?

A. No, I grant you that.

Q. What was the consideration for the \$1,480 which you took from his account?

A. The way you are putting it, nothing.

Q. Not a thing? A. Not a thing.

Q. And he didn't authorize you to take it out of there and pay it to Maurice Johnson, did he?

A. No.

(Testimony of Ralph Bailey.)

Q. Neither verbally nor in writing?

A. Not for this specific case, no.

Q. And that case is still pending, isn't it, the Bank of Fairbanks against Kaye?

A. Yes, waiting for the Judge's decision.

Mr. McNabb: That is all. [13]

Cross-Examination

By Mr. Johnson:

Q. Mr. Bailey, at the time that this transaction occurred, how much was Mr. Kaye indebted to the bank in principal?

Mr. McNabb: Just a minute. I object to that on the ground that it has no bearing on the issues in this case.

The Court: Read that question, please.

(Thereupon the reporter read the last question.)

Mr. Johnson: It certainly does have a bearing on the case.

The Court: Objection overruled.

Mr. Johnson: Go ahead, Mr. Bailey.

A. \$12,100 plus interest. That is principal you asked for. \$12,100.

Q. \$12,100? A. Yes.

Q. And that was past due at that time, was it?

A. That is correct.

Q. In addition to that principal sum, what sums were due and owing?

(Testimony of Ralph Bailey.)

A. Interest from various different dates to that particular date.

Q. And were costs and attorney's fees also due and owing?

Mr. McNabb: Just a minute.

A. That is correct. [14]

Mr. McNabb: I object to that as calling for a conclusion and move that the answer be stricken.

The Court: It may be stricken.

Q. (By Mr. Johnson): What else was due and owing, if anything, at that time, in addition to accrued interest?

A. If my memory is correct, there was nothing else.

Q. These items that appear on this exhibit, had they been incurred prior to the date of that exhibit?

Mr. McNabb: Just a minute. I am going to object to that——

A. That is correct.

Mr. McNabb: Wait a minute, Mr. Bailey.

The Witness: Excuse me.

The Court: State your objection.

Mr. McNabb: It calls for a conclusion, it is not the best evidence, and he has already testified that the charges on here were incurred by the bank and not by Mr. Kaye, and that he had not employed or authorized the payment of those charges.

Mr. Johnson: I still think the question is significant, your Honor.

The Court: Read the question, please.

(The reporter read the last question.)

(Testimony of Ralph Bailey.)

The Court: Objection overruled. You may answer.

Q. (By Mr. Johnson): Had that been incurred by you prior to the time of [15] that exhibit?

A. That is correct.

Q. When did you start this foreclosure suit, No. 7114, do you recall?

A. Sometime in April, 1952.

Q. I will show you the complaint in case No. 7114, that bears a file mark April 23, 1952. Is that about the time you started that case, to your recollection? A. That is correct.

Q. The case had been pending and still is pending; is that correct? A. That is correct.

Q. As far as you know? A. That is right.

Mr. McNabb: That has already been testified to.

Q. (By Mr. Johnson): And when the charges were made as appear on that exhibit, Plaintiff's Exhibit A, they constituted part of the indebtedness that was then owed by Mr. Kaye to the Bank of Fairbanks by reason of these mortgages and notes; is that correct? A. That is correct.

Mr. McNabb: Just a minute. I object to that and move that the answer be stricken on the ground that the testimony is that the plaintiff here didn't employ Mr. Johnson. It is [16] not the best evidence and calls for a conclusion of the witness as to charges made for the account of the attorney for the defendant.

The Court: Isn't there a clause in the mortgage

(Testimony of Ralph Bailey.)

that if a foreclosure is commenced that they are authorized to expend whatever money is necessary, and so forth?

Mr. Johnson: Yes, sir, there is such a clause in the mortgage.

The Clerk: Defendant's Identification A.

Mr. Johnson: Make this a collective exhibit, mortgages, Exhibits A through D.

The Clerk: That is Identification A, defendant's.

(Mortgages attached to complaint in cause No. 7114 as Exhibits A, B, C and D, were marked Defendant's Identification A.)

Q. (By Mr. Johnson): I will show you Defendant's Identification A, which is a collective exhibit that is attached to the complaint in case No. 7114. Will you examine those briefly and tell what they are, if you know? There are four exhibits, A, B, C and D.

A. Exhibit A is a real and chattel mortgage. It is a copy thereof, of a real and chattel mortgage.

Q. And Exhibit B?

A. Is a mortgage. [17]

Q. Is that a copy?

A. Copy of a mortgage. Exhibit C is a mortgage, also a chattel, a copy thereof. Exhibit D is also a real and chattel mortgage or a copy thereof.

Q. These four copies, being A, B, C and D, are copies of the mortgages that are being foreclosed in the action known as 7114?

(Testimony of Ralph Bailey.)

A. It is presumed so. I mean I haven't read them clear through.

Mr. Johnson: We would like, if the Court please, to offer as Defendant's Exhibit 1 the collective identification A.

Mr. McNabb: Your Honor, I am going to object to the admission of these instruments on the ground, first, that the first of these mortgages which have been offered does not mention the payment by the plaintiff here of attorney's fees to the defendant corporation. It is mentioned in the note but not in the mortgage. In the second of the mortgages it provides that in the event of sale on foreclosure that a reasonable attorney fee shall be paid from the sale of the mortgaged property, and that same provision is to be found in the third and fourth mortgages, and there has been no sale here of the property. This cause has not gone to judgment. The only statement in the mortgage concerning the payment of attorney fees is "he may proceed to sell said [18] chattels at public auction in the manner provided by law for the sale of personal property under execution, and, from the proceeds thereof, shall pay, first, all expenses of seizure, keeping, and sale of said property, including a reasonable fee for mortgagee's attorney."

After a hasty perusal, your Honor, those are the only matters that I find in any one of these instruments.

Mr. Johnson: If the Court please, the notes are

(Testimony of Ralph Bailey.)

part of the mortgage as well as the mortgage itself, and copies of the notes are attached to these copies of the mortgage, so I believe that all of these things are pertinent or germane to the issue.

Mr. McNabb: But that is a mortgage foreclosure, your Honor, and in an action on the note there is no debt due on a note at any time until such mortgage foreclosure is decreed.

Mr. Johnson: The action is asking for judgment, if the Court please, for the amount due, as well as for the foreclosure of the mortgage, and the notes themselves provide that "if the note is not paid at maturity and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection, including reasonable attorney's fees." Each of the notes has that same provision and they become part of this transaction.

The Court: I don't find copies to all of these notes. Do you have them there? [19]

Mr. Johnson: These are the originals, your Honor. I was going to offer these.

The Court: All of the notes provide that if suit is brought or if it is placed in the hands of an attorney for collection, the makers of the note will pay the costs, and of course the note is a part of the mortgage and the mortgage foreclosure, so the contract would authorize Mr. Bailey in debiting the account and applying it on those attorney's fees.

Mr. Johnson: Then, I take it that this exhibit is admitted in evidence; is that correct?

(Testimony of Ralph Bailey.)

The Court: I think the notes are pretty hard to find, there are so many pages.

Mr. Johnson: We will get them back.

The Witness: We have duplicate copies.

The Clerk: Defendant's Identification B.

(Four notes signed by Kaye were marked Defendant's Identification B.)

Q. (By Mr. Johnson): I will hand you Defendant's Identification B, which is a collective identification containing what purports to be four signed promissory notes and will ask you to identify those, if you can.

A. These are four separate notes.

Q. Are they signed by A. L. Kaye?

A. That is correct. [20]

Q. And anyone else? A. Also Jean Kaye.

Q. And are they payable to the Bank of Fairbanks?

A. They are payable to the Bank of Fairbanks.

Q. Did they constitute the evidences of the indebtedness due the Bank of Fairbanks at the time the foreclosure suit was started in April, 1952?

A. That is correct.

Q. And did they also constitute the evidence of indebtedness to the bank in October of 1952 at the time this debit was made?

A. That is correct.

Mr. Johnson: We would like to offer defendant's collective identification B.

(Testimony of Ralph Bailey.)

Mr. McNabb: May I ask this witness a question in reference to these at this time, your Honor?

Mr. Johnson: I have offered them, your Honor.

The Court: He has offered them. All right, you may ask a question if you like.

Mr. McNabb: Do these notes indicate that there was \$12,000 due in October of 1952, the 24th of October of 1952?

The Witness: Yes, some twelve thousand plus.

Mr. McNabb: No objection.

The Court: They may be admitted.

The Clerk: Defendant's Exhibit No. 1. [21]

(The four notes signed by Kaye, previously marked Defendant's Identification B, were received in evidence as Defendant's Exhibit 1.)

DEFENDANT'S EXHIBIT No. 1

Kaye, A. L.

No. M-423

Fairbanks, Alaska, January 30, 1950

\$5,000.00

\$1,000.00 on or before December 1, 1950

\$4,000.00 on or before December 31, 1950, after date, for value received

We jointly and severally promise to pay to the order of Bank of Fairbanks, at its office in Fairbanks, Alaska, Five Thousand and no/100ths Dollars with interest from date..... at the rate of eight per cent per annum, payable quarterly and at maturity until paid. If interest is not paid when due, or if principal is not paid at maturity, then the interest and principal to draw interest from maturity hereof until paid, at the rate of eight per cent per annum. If default be made in the payment of any installment of interest when due then the whole of this note, both principal and interest, shall forthwith become due and

(Testimony of Ralph Bailey.)

Defendant's Exhibit No. 1—(Continued)

payable without demand at the option of the holder of the note. Principal and interest are payable only in Legal Currency of the United States of America. For value received, each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment, any release or discharge arising from any extension of time, discharge of a prior party, or from any cause other than actual payment in full hereof, binds himself hereon as a principal, not as a surety, and promises, if this note is not paid at maturity and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection, including reasonable attorney's fees, and agrees that, at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division of Alaska.

A. L. KAYE,
JEAN KAYE.

Address: Box 550.

Security: Real & Chattel Mortgage on Home.

Fairbanks, Alaska,....., 19....

For value received, I hereby guarantee the payment of the within note, consent to any extension of time granted maker, and waive demand, notice of protest and of non-payment thereof.

Payments				
Date	Interest Paid To	Interest	Apply Principal	Balance Due
3/ 1/50	3/ 1/50	\$ 33.33		\$5,000
3/20/50	4/ 1/50	33.33		5,000
4/28/50	5/ 1/50	33.33		5,000
5/31/50	6/ 1/50	33.33		5,000
6/30/50	7/ 1/50	33.33		5,000
7/22/50	8/ 1/50	33.33		5,000
8/22/50	9/ 1/50	33.33		5,000
10/21/50	10/ 1/50	33.33		5,000
12/21/50	11/ 1/50	100.00		5,000
3/16/51	4/ 1/51	100.00		5,000
9/11/51	10/ 1/51	200.00		5,000
10/13/51	10/ 8/51	7.78		5,000

(Testimony of Ralph Bailey.)

Defendant's Exhibit No. 1—(Continued)

Kaye, A. L.

No. M-180

Fairbanks, Alaska, November 22, 1948

\$6,300.00

For value received, we jointly and severally promise to pay to the order of Bank of Fairbanks, at its office in Fairbanks, Alaska, Six Thousand Three Hundred and no/100ths Dollars with interest from.....at the rate of eight per cent per annum until this note is fully paid. Principal payable \$500.00 per month on the 22nd day of each month, beginning December 22, 1948, and continuing until this note is paid in full.

The amount of interest due on this note is to be paid at the same time the principal installments are paid. If any such installments of principal or interest is not paid when due, the whole sum of principal and interest shall at the option of the holder become immediately due and payable. Principal and interest are payable only in Legal Currency of the United States of America. For value received each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment binds himself hereon as a principal, not as surety, and promises, if this note is not paid at maturity and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection including reasonable attorney's fees, and agrees that at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division of Alaska.

A. L. KAYE,
JEAN KAYE.

Security: Mortgage.

Mailing Address: Box 550.

Living Address:

Fairbanks, Alaska,....., 19....

For value received, I hereby guarantee the payment of the within note, consent to any extension of time granted maker, and waive demand, notice of protest and of non-payment thereof.

.....
.....

(Testimony of Ralph Bailey.)

Defendant's Exhibit No. 1—(Continued)

Payments

Date	Interest Paid To	Interest	Apply Principal	Balance Due
2/ 2/49	1/22/49	\$ 84.00		\$6,300
2/21/49	2/22/49	42.00		6,300
3/26/49	3/22/49	42.00		6,300
4/25/49	4/22/49	42.00		6,300
6/ 3/49	5/22/49	42.00		6,300
6/27/49	6/22/49	42.00		6,300
7/29/49	7/22/49	42.00		6,300
8/23/49	8/22/49	42.00		6,300
10/ 1/49	9/22/49	42.00		6,300
10/22/49	10/22/49	42.00		6,300
10/29/49	11/22/49	42.00		6,300
12/28/49	12/22/49	42.00		6,300
1/25/50	1/22/50	42.00		6,300
3/ 1/50	2/22/50	42.00		6,300
3/20/50	3/22/50	42.00		6,300
4/28/50	4/22/50	42.00	300	6,000
5/31/50	5/22/50	40.00	300	5,700
6/30/50	6/22/50	38.00	300	5,400
7/22/50	7/22/50	36.00	300	5,100
8/22/50	8/22/50	34.00	300	4,800
10/24/50	10/22/50	64.00		4,800
12/21/50	1/ 1/51	74.02	700	4,100
3/16/51	4/ 1/51	82.00		4,100
9/11/51	10/ 1/51	164.00		4,100
10/13/51	10/ 8/51	6.38		4,100

Kaye, A. L.

No. M-39

Fairbanks, Alaska, May 8, 1945

\$10,000.00

For value received, we jointly and severally promise to pay to the order of Bank of Fairbanks, at its office in Fairbanks, Alaska, Ten Thousand and no/100ths Dollars with interest from date at the rate of eight per cent per annum until this note is fully paid. Principal payable \$300.00 per month on the 8th day of each

(Testimony of Ralph Bailey.)

Defendant's Exhibit No. 1—(Continued)

month, beginning June 8, 1945, and continuing until this note is paid in full.

The amount of interest due on this note is to be paid at the same time the principal installments are paid. If any such installments of principal or interest is not paid when due, the whole sum of principal and interest shall at the option of the holder become immediately due and payable. Principal and interest are payable only in Legal Currency of the United States of America. For value received each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment binds himself hereon as a principal, not as surety, and promises, if this note is not paid at maturity and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection including reasonable attorney's fees, and agrees that at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division of Alaska.

A. L. KAYE,
JEAN KAYE.

Security: Real Estate Mortgage.

Mailing Address:

Living Address:

Fairbanks, Alaska,....., 19....

For value received, I hereby guarantee the payment of the within note, consent to any extension of time granted maker, and waive demand, notice of protest and of non-payment thereof.

.....
.....

(Testimony of Ralph Bailey.)

Defendant's Exhibit No. 1—(Continued)

Payments

Date	Interest Paid To	Interest	Apply Principal	Balance Due
				\$3,400
1/14/49			200	3,200
2/ 2/49	1/24/49	203.55	300	2,900
2/21/49	2/24/49	19.34	500	2,400
3/26/49	3/24/49	16.01	500	1,900
4/25/49	4/24/49	12.67	500	1,400
6/ 3/49	5/24/49	9.34	500	900
6/27/49	6/24/49	6.00		900
7/29/49	7/24/49	6.00		900
8/23/49	8/24/49	6.00		900
10/ 1/49	9/24/49	6.00		900
10/22/49	10/24/49	6.00		900
10/20/49	11/24/49	6.00		900
12/28/49	12/24/49	6.00		900
1/25/50	1/24/50	6.00		900
3/ 1/50	2/24/50	6.00		900
3/20/50	3/24/50	6.00		900
4/28/50	4/24/50	6.00		900
5/31/50	5/24/50	6.00		900
6/30/50	6/24/50	6.00		900
7/22/50	7/24/50	6.00		900
8/22/50	8/24/50	6.00		900
10/21/50	9/24/50	6.00		900
12/21/50	1/ 1/51	20.00		900
3/16/51	4/ 1/51	18.00		900
9/11/51	10/ 1/51	36.00		900
10/13/51	10/ 8/51	1.40		900

(Testimony of Ralph Bailey.)

Defendant's Exhibit No. 1—(Continued)

Kaye, A. L.

No. M-483

Fairbanks, Alaska, February 3, 1951

\$5,000.00

On or before one year after date, for value received.

We jointly and severally promise to pay to the order of Bank of Fairbanks at its office in Fairbanks, Alaska Five Thousand and no/100ths Dollars with interest from date..... at the rate of eight per cent per annum, payable quarterly and at maturity until paid. If interest is not paid when due, or if principal is not paid at maturity, then the interest and principal to draw interest from maturity hereof until paid, at the rate of eight per cent per annum. If default be made in the payment of any installment of interest when due then the whole of this note, both principal and interest, shall forthwith become due and payable without demand at the option of the holder of the note. Principal and interest are payable only in Legal Currency of the United States of America. For value received, each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment, any release or discharge arising from any extension of time, discharge of a prior party, or from any cause other than actual payment in full hereof, binds himself hereon as a principal, not as a surety, and promises, if this note is not paid at maturity and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection, including reasonable attorney's fees, and agrees that, at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division of Alaska.

A. L. KAYE,
JEAN KAYE.

(Testimony of Ralph Bailey.)

Defendant's Exhibit No. 1—(Continued)

Address:

Security: Real & Chattle Mortgage.

Fairbanks, Alaska,....., 19....

For value received, I hereby guarantee the payment of the within note, consent to any extension of time granted maker, and waive demand, notice of protest and of non-payment thereof.

.....

.....

Payments

Date	Interest Paid To	Interest	Apply Principal	Balance Due
3/16/51	4/ 1/51	64.44		\$5,000.00
9/11/51	10/ 1/51	200.00		5,000.00
10/13/51	10/ 8/51	7.78		5,000.00
11/ 9/51	11/ 8/51	33.33	606.67	4,393.33
12/11/51	12/ 8/51	29.29	501.21	3,892.12
2/11/52	2/ 8/52	51.90	247.43	3,644.69
3/10/52	3/ 8/52	24.30	270.37	3,374.32
3/12/52	3/ 8/52		57.50	3,316.82
4/16/52	4/ 8/52	22.11	328.73	2,988.09
7/21/52	7/21/52	69.73	888.09	2,100.00

Received in evidence October 8, 1953.

Mr. Johnson: That is all.

Mr. McNabb: That is all the questions I have.

(Witness excused.)

ALVIN LEON KAYE

a witness called in behalf of the plaintiff, was sworn and testified as follows:

Direct Examination

By Mr. McNabb:

Q. Would you state your name please, sir?

A. Alvin Leon Kaye.

Q. Where do you reside, Mr. Kaye?

A. Fairbanks, Alaska.

Q. How long have you resided here, sir?

A. Since 1939.

Q. Have you had a bank account in the Bank of Fairbanks since you have been a resident of Fairbanks?

A. Since the starting of the bank, yes.

Q. Did you have an account there on the 24th of October of 1952?

A. I did.

Q. I would like to show you Plaintiff's Exhibit A and ask if you know what that is, please, sir. [22]

A. Yes.

Q. What is it?

A. It is a charge made to my account by the Bank of Fairbanks of \$1,480.

Q. Upon what day was that charge apparently made?

A. On October—it is typed October 23, 1952.

Q. Do you know what that charge was made for?

A. Yes.

Q. What was it made for?

(Testimony of Alvin Leon Kaye.)

A. According to this, for the Bank of Fairbanks' attorney's fees and marshal and court costs.

Q. And do you know to whom that money was paid?

A. According to this it states that it was paid to Maurice Johnson.

Q. Did you ever authorize the bank to employ Mr. Johnson? A. No.

Q. Has Mr. Johnson ever represented you? Was Mr. Johnson representing you on the 24th of October of 1952? A. No.

Mr. McNabb: That is all.

Mr. Johnson: No questions.

(Witness excused.)

Mr. McNabb: The plaintiff rests, your Honor.

The Court: Very well. [23]

(Thereupon counsel presented closing arguments to the Court.)

The Court: This contract on the note that the maker of the note would pay attorney's fees if an attorney is employed, if it is put in his hands for collection, or even the later thing, if a suit is brought—in this case both of those things had been done and the contract then became in full force. They didn't have to wait until the case was over and the attorney didn't have to wait until he got through the case before he got any money. You know, as a matter of fact, attorneys don't do that. They usually make a charge at the beginning of the case for their attorney's fees, and this contract set

forth on the note that if a suit was even brought or if it was placed in the hands of an attorney, even that far back, the attorney's fee was covered, so I think it is covered in this case all the way through, and I find for the defendant, the Bank of Fairbanks.

Mr. Johnson: I will prepare the findings and judgment.

The Court: Yes. Very well.

Mr. Johnson: If the Court please, may we have leave to withdraw these notes and substitute copies? The original notes are a part of the exhibit.

The Court: Yes.

Mr. Johnson: Very well, thank you.

(Thereupon, at 11:30 a.m., October 8, 1953, the trial of this cause was concluded.)

[Endorsed]: Filed October 23, 1953. [24]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered that this cause came on for trial before the above-entitled Court, without a jury, on the 8th day of October, 1953, at 10:00 o'clock a.m., at which time the said cause had theretofore been set for trial. The issues were joined on the Complaint of the Plaintiff and the Answer of the Defendant. The Plaintiff appeared in person and

by his attorney, George B. McNabb, Jr. The Defendant appeared by Ralph C. Bailey, its vice president, and by Maurice T. Johnson, its attorney; and the Court having heard the testimony of the witnesses, and having considered the evidence and exhibits, and having heard the arguments of counsel, does now make and order filed herein, the following:

FINDINGS OF FACT

I.

That the allegations contained in Paragraph III of the Plaintiff's Complaint are not true.

II.

That the funds deposited in the Defendant Bank, by the Plaintiff, were the property of the Plaintiff, and that said funds were deposited without instructions, and that at the time of said deposit the Plaintiff was indebted to the Defendant Bank in a sum far in excess of said deposit, which indebtedness included principal, interest, attorney's fees and costs, and that the said items of indebtedness were due and owing from the Plaintiff to the Defendant Bank at the time the Defendant Bank debited the account of the Plaintiff in the sum of \$1,480.00; and that the Defendant applied the said sum of \$1,480.00 on deposit in the name of the Plaintiff as a part payment of the indebtedness then due and owing by the Plaintiff to the Defendant Bank, namely, on the 24th day of October, 1952.

And from the foregoing Findings of Fact, said Court does now make and enter the following:

CONCLUSIONS OF LAW

I.

That the Plaintiff should take nothing by his Complaint.

II.

That the Defendant should have and recover of and from the Plaintiff the sum of \$322.00 for Defendant's reasonable attorney's fees in this action, and for the Defendant's costs and disbursements herein to be taxed by the Clerk of this Court.

Done at Fairbanks, Alaska, this 12th day of October, 1953.

/s/ HARRY E. PRATT,
District Judge.

Service of Copy acknowledged.

Lodged October 8, 1953.

[Endorsed]: Filed October 12, 1953.

In the District Court for the District of Alaska,
Fourth Division

No. 7309

A. L. KAYE,

Plaintiff,

vs.

BANK OF FAIRBANKS, a Banking Corporation,
Defendant.

JUDGMENT AND DECREE

Be It Remembered that this cause came on for trial before the above-entitled court, without a jury, on the 8th day of October, 1953, at 10:00 o'clock a.m., at which time the said cause had theretofore been set for trial. The issues were joined on the Complaint of the Plaintiff and the Answer of the Defendant. The Plaintiff appeared in person and by his attorney, George B. McNabb, Jr. The Defendant appeared by Ralph C. Bailey, its vice president, and by Maurice T. Johnson, its attorney; and the Court having heard the testimony of the witnesses, and having considered the evidence and exhibits, and having heard the arguments of counsel, and having heretofore made and ordered filed herein its Findings of Fact and Conclusions of Law, and the Court being fully advised in the premises;

It Is Hereby Ordered, Adjudged and Decreed that the Plaintiff take nothing by his Complaint herein.

It Is Further Ordered, Adjudged and Decreed

that the Defendant, Bank of Fairbanks, above named, have and recover of and from the Plaintiff, A. L. Kaye, above named, the sum of \$322.00 for Defendant's reasonable attorney's fees herein and for Defendant's costs and disbursements herein to be taxed by the Clerk of this Court in the sum of \$4.00.

Let execution issue therefor after ten days from the date hereof.

Done at Fairbanks, Alaska, this 12th day of October, 1953.

/s/ HARRY E. PRATT,
District Judge.

Service of Copy acknowledged.

[Endorsed]: Filed and entered October 12, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes Now, the above-named Plaintiff, by his Attorney, George B. McNabb, Jr., and does hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the Judgment entered in the above-entitled cause on the 8th day of October, 1953.

/s/ GEORGE B. McNABB, JR.,
Attorney for Plaintiff.

Service of Copy acknowledged.

[Endorsed]: Filed October 21, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings in this cause listed in the Designation of Record of the plaintiff and appellant and the Additional Designation of Record filed by the defendant and appellee, viz:

	Pages
1—Complaint	1 to 2
2—Answer	3 to 4
3—Transcript of Proceedings of October 8, 1953	5 to 31
4—Findings of Fact and Conclusions of Law	32 to 33
5—Judgment and Decree.....	34
6—Notice of Appeal.....	35
7—Statement of Points.....	36
8—Designation of Record.....	37
9—Additional Designation of Record..	38

Plaintiff's Exhibit "A" and Defendant's Exhibit "B" in enclosed white envelope.

Witness my hand and the seal of the above-entitled Court this 29th day of October, 1953.

/s/ JOHN B. HALL,
Clerk of Court.

[Endorsed]: No. 14110. United States Court of Appeals for the Ninth Circuit. A. L. Kaye, Appellant vs. Bank of Fairbanks, a Corporation, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division.

Filed November 2, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth District.

United States Court of Appeals
for the Ninth Circuit

No. 14110

A. L. KAYE,

Plaintiff-Appellant,

vs.

BANK OF FAIRBANKS, a Banking Corporation,
Defendant-Appellee.

STATEMENT OF POINTS

The points upon which Plaintiff-Appellant will rely on appeal are:

1. The Judgment and Decree are contrary to the evidence.

2. The Judgment and Decree are contrary to the Law.

3. The Court erred in overruling Plaintiff's objection to testimony of Defendant's witness Bailey.

/s/ GEORGE B. McNABB, JR.,
Attorney for Plaintiff-
Appellant.

Service of Copy acknowledged.

[Endorsed]: Filed December 17, 1953.